STATE OF MICHIGAN

COURT OF APPEALS

JERRELL O. NOLEN,

Plaintiff-Appellee,

v

KRYSTAL NOLEN,[1]

Defendant-Appellant.

UNPUBLISHED
August 11, 2005

No. 261029
Wayne Circuit Court
LC No. 02-214833-DM

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In this child custody case, defendant appeals as of right the trial court's order setting aside a previous order for a best interest hearing, MCL 722.23, and the award of attorney fees to plaintiff. We reverse and remand.

Plaintiff's complaint for divorce requested joint legal and physical custody of the child. Defendant was served with the summons and complaint for divorce but did not respond. Plaintiff filed a notice of default and entry of default. Plaintiff later filed a proposed default judgment of divorce that sought **sole** physical custody of the child. Defendant did not respond to these court filings. The trial court entered a default judgment of divorce awarding plaintiff sole physical custody.

Defendant moved to set aside the default judgment of divorce. At the hearing on defendant's motion, defendant testified that after being served with the complaint for divorce, she received no further documentation regarding this case until receiving the default judgment of divorce, approximately two months after its entry.

The trial court initially set aside the default judgment, and set a settlement conference date. The court ordered the parties would have temporary joint legal custody and defendant would have physical custody, with reasonable visitation for plaintiff. However, the court later reinstated the default judgment of divorce, and set a hearing date for defendant's motion to set

[1] Krystal Nolen is also known as Krystal Reden.

aside the default judgment. After the hearing, the court denied defendant's motion. The trial court denied several subsequent motions defendant filed regarding custody.

Defendant contends that the trial court erred in failing to conduct a best interest hearing.[2] We agree.

A motion to set aside a default judgment may be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Alken-Ziegler v Waterbury Headers,* 461 Mich 219, 223; 600 NW2d 638 (1999). Good cause sufficient to warrant setting aside a default judgment may be shown by: (1) a substantial procedural defect or irregularity, or (2) a reasonable excuse for the failure to comply with requirements which created the default. *Alken-Ziegler, supra* at 233. A substantial defect or irregularity must have prejudiced the defendant to constitute good cause. *Alycekay Co v Hasko Construction Co,* 180 Mich App 502, 506-507; 448 NW2d 43 (1989). The failure to give required notice of entry of default or default judgment is good cause. *Bradley v Fulgham,* 200 Mich App 156, 158-159; 503 NW2d 714 (1993).

Defendant testified that after being served with the summons and complaint for divorce, she received no further documents regarding this case until she received the default judgment of divorce two months after it had been entered.[3] Defendant testified that she would never have agreed to the terms of the default judgment of divorce, which differed from the terms of plaintiff's complaint for divorce regarding physical custody of the child. The testimony at the hearing on defendant's motion to set aside the default judgment was that the minor child lived primarily with defendant his entire life.

We conclude that defendant established good cause to set aside the default judgment of divorce. The lower court record is devoid of a proof of service for the "Default and Notice of Entry of Default" plaintiff filed. See *Bradley, supra* at 158-159. Defendant testified that she did not receive the notice of entry of the default judgment of divorce, either, and that she had moved from her former address in November 2002, which was months before plaintiff filed the default and notice of entry of default and all subsequent pleadings. Defendant thus established a substantial procedural defect. Further, defendant clearly established that she was prejudiced by this procedural defect, as the child had lived with her for most of his life, she had been served with the complaint for divorce that said plaintiff was seeking **joint** physical and legal custody, and had no notice that plaintiff later sought **sole** physical custody, until after the default judgment of divorce awarding plaintiff sole physical custody was entered. Defendant thus never had opportunity to present proofs at a best interest hearing[4], and no such hearing took place. The

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[2] Plaintiff did not file an appellate brief.

[3] The proposed default judgment of divorce submitted for entry pursuant to MCR 2.602(b)(3) was mailed to defendant's mother's address, 12810 S. Wallace, Chicago, Illinois, on April 11, 2003. Defendant testified at the hearing on her motion to set aside the default judgment of divorce that in November 2002, she had moved from her mother's house on S. Wallace to a new address on S. Paulina. Plaintiff testified he knew defendant had moved, but did not know when.

[4] MCL 722.27(1)(c) provides in pertinent part: "The court shall not modify or amend its (continued…)

effect of the court's decision was to penalize the child, for whose benefit a best interest hearing is held.

For the reasons stated above, we reverse the trial court's denial of defendant's motion to set aside the default judgment of divorce as it pertains to custody, and remand for an evidentiary hearing of the best interest factors under MCL 722.23.[5] We also reverse the court's award of attorney fees to plaintiff. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

(…continued)

previous judgments or orders or *issue a new order so as to change the established custodial environment of a child* unless there is presented clear and convincing evidence that it is in the best interest of the child." [Emphasis added.] Courts determine the best interests of the child by considering the factors set forth in MCL 722.23. This Court must rely on findings of fact by a trial judge to rule effectively on custody decisions. See, e.g., *Wolfe v Howatt*, 119 Mich App 109, 112; 326 NW2d 442 (1982).

[5] Given our disposition, we do not reach defendant's remaining challenges.